Supreme Court, U.S.
FILED

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No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

JEFFREY SCOTT DEPENBROCK,
Petitioner,

v.

UNITED STATES,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether this Court's decision in United States v. Lopez requires that as an element of a crime under 18 U.S.C. § 922(g)(1) -- unlawful possession of a firearm by an ex-felon -- there must be an economic activity that substantially affected interstate commerce?

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The petitioner Jeffrey Scott Depenbrock respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered on March 19, 1996.

OPINIONS BELOW

The memorandum of the United States Court of Appeals for the Ninth Circuit is unreported, but is set out as Appendix A.

JURISDICTION

The United States Court of Appeals for the Ninth Circuit entered its opinion on March 19, 1996. This petition for certiorari was filed within ninety days of that date. The Court's jurisdiction is invoked pursuant to 28 U.S.C. section 1254(1).

STATUTES INVOLVED

This petition is based, in part, on the following statute: Section 922 (g)(1) of the United States Code, which provides:

> (g) It shall be unlawful for any person --
> (1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year
> . . .
> to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

STATEMENT OF THE CASE

On July 13, 1994, the government filed a second superseding criminal indictment charging petitioner on several counts. Count two was for Unlawful Possession of a Firearm by a Felon in violation of 18 U.S.C. section 922(g)(1).

A jury trial was held on July 15, 1994, and July 18, 1994. The jury initially found appellant guilty on all counts, but

on polling the jury, one juror indicated her dissension. After further deliberation the jury found appellant guilty on count two only. As to the other counts, the jury was deadlocked and the judge declared a mistrial as to counts one and four.

In lieu of retrial, appellant changed his plea to guilty on count one in exchange for the dismissal of count four. On October 20, 1994, the district court sentenced appellant to serve 110 months for each count and provided that the sentences run concurrently.

The second superseding indictment concerned the events of a single night.

Police officers with the Las Vegas Metropolitan Police Department ("Metro") detained the appellant on January 23, 1994, for an outstanding traffic warrant. The officers searched the car appellant was driving and found a BB gun, small quantities of methamphetamine, and a relative's prescription medicine. During his incarceration, appellant initiated contact with Metro narcotics detectives Joseph Kelley and David Burtrand and volunteered information regarding acquaintances he knew to be involved in the manufacture or "cooking" of methamphetamine. One of the individuals appellant named, Thomas Fletcher, happened to be an undercover police officer, unbeknownst to appellant. The detectives designated appellant as a cooperating individual, or informant, arranged for his release, and executed a cooperating witness agreement with him. The detectives released appellant so he could "set up" one or more of the individuals he had identified.

On his release, appellant contacted various individuals he had named based on his understanding of the agreement he entered with the detectives. He began by trying to regain the confidence of these individuals after his recent incarceration, including being present at another "cook" of methamphetamine. The only parties with whom he had any success were David Gordon, his co-defendant, and Tom Fletcher, the undercover police officer.

On February 9, 1994, after telling two people of his role as an informant and his instructions from Detective Kelley, appellant attended a cook in a motel room paid for by Fletcher. While the "cook" was preparing materials for the methamphetamine substance, appellant hid the "cook's" Ruger .45 caliber handgun behind the television in the motel room in an effort to keep it away from him, and in accord with his understanding of Detective Kelley's instructions. In any event, before appellant had time to leave the motel room, and much to his surprise, Detective Kelley and others commenced to raid the motel room, and appellant was arrested. This arrest resulted in the charges, plea, and conviction, which form the basis of petitioner's appeal to the Ninth Circuit.

REASONS FOR ALLOWANCE OF THE WRIT

THE NINTH CIRCUIT IGNORED UNITED STATES v. LOPEZ, WHICH REQUIRES THE GOVERNMENT TO PROVE APPELLANT'S POSSESSION OF A FIREARM WAS AN ECONOMIC ACTIVITY THAT SUBSTANTIALLY AFFECTED INTERSTATE COMMERCE.

This Court's decision in United States v. Lopez, ___ U.S. ___, 115 S. Ct. 1624 (1995), required the government to prove that appellant's violation of 18 U.S.C. section 922(g)(1) constituted an economic activity that substantially affected interstate commerce. The Ninth Circuit, citing United States v. Hanna, 55 F.3d 1456 (9th Cir. 1995), rejected petitioner's argument that Lopez requires more than a showing that the firearm had been transported in interstate commerce. But Lopez does require more.

The district court correctly articulated the elements of count two – unlawful possession of a firearm by an ex-felon in violation of 18 U.S.C. section 922(g)(1).

> The essential elements required to prove -- to be proven in order to establish the offenses charged in the indictment are:
>
> First, that the defendant had been convicted of a crime punishable by imprisonment for a term exceeding one year as charged in the Indictment.

> Second, that the defendant knowingly possess a Ruger semi-automatic pistol, caliber .45, bearing serial number 66041547.
>
> And, third, that the firearm had been transported in interstate commerce.

Reporter's Transcript of Jury Instructions pp. 14-15 (emphasis supplied). It is to the third element that the government failed to offer sufficient proof and the Ninth Circuit's decision misconstrued.

This Court struck down 18 U.S.C. section 922(q), which makes illegal the possession of a firearm in a school zone. This is a sister statute of 18 U.S.C. section 922(g)(1), under which appellant was convicted. In analyzing legislative enactments under the commerce clause, the Court held that legislation regulating an activity will be upheld only "where an economic activity substantially affects commerce." Lopez, 115 S. Ct. at 1630 (emphasis added). Section 922(g)(1) prohibiting the possession of a firearm, like its sister section 922(q), "is a criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms." Id. at 1630-31.

The government was required to show that appellant's possessing the firearm was an "economic activity," which "substantially affected" interstate commerce. No such showing was made. Instead the prosecution presented only a minimal showing that the firearm had previously traveled in interstate commerce. After Lopez, this showing is not sufficient.

> The possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce. Respondent was a local student at a local school; there is no indication that he had recently moved in interstate commerce, and there is no requirement that his possession of the firearm have any concrete tie to interstate commerce.

Id. at 1634. Possession of a firearm is not an economic activity or an activity which, upon repetition will substantially affect interstate commerce. Like defendant Lopez, appellant was a local resident convicted for a local crime without any concrete indication that he had recently traveled or that the firearm had recently traveled in interstate commerce. The interstate commerce element of count two, as required by Lopez, was not supported by any evidence. The Ninth Circuit's opinion stating that this requirement need not be satisfied must be reversed.

CONCLUSION

This Court should issue a writ of certiorari to the United States Court of Appeals for the Ninth Circuit. The Ninth Circuit's decision is in conflict with this Court's decision in United States v. Lopez.

Respectfully submitted,

HUTCHISON & STEFFEN

By: MARK A. HUTCHISON

Attorneys for Petitioner

APPENDIX

APPENDIX A

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,)
Plaintiff-Appellee,)
v.)
JEFFREY SCOTT DEPENBROCK,)
Defendant-Appellant.)
)

No. 94-10565
D.C. No. CR-94-00048-LDG

MEMORANDUM*

Appeal from the United States District Court
for the District of Nevada
Lloyd D. George, District Judge, Presiding

Submitted March 11, 1996**
San Francisco, California

Before: THOMPSON, KLEINFELD and TASHIMA, Circuit Judges.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a); 9th Cir. R. 34-4.

We do not decide Depenbrock's ineffective assistance of counsel claim. "'[T]he customary procedure in this Circuit for challenging the effectiveness of defense counsel in a federal criminal trial is by collateral attack on the conviction under 28 U.S.C. § 2255, and this Court has been chary of analyzing insufficiency of counsel claims on direct appeal.'" United States v. Rewald, 889 F.2d 836, 859 (1989), amended, 902 F.2d 80 (9th Cir. 1990) (quoting United States v. Schaflander, 743 F.2d 714, 717 (9th Cir. 1984)). The purpose behind this general rule is to "permit[] the defendant to develop a record as to what counsel did, why it was done, and what, if any prejudice resulted." Id. (quotation omitted). Because additional facts are necessary to determine whether there is any merit to Depenbrock's claim of ineffective assistance, it is left for collateral review. United States v. Robinson, 967 F.2d 287, 290 (9th Cir. 1992).

Though phrased as a substantial evidence challenge, Depenbrock's second argument is in substance a claim that 18 U.S.C. § 922(g)(1) is unconstitutional under United States v. Lopez, 115 S. Ct. 1624 (1995), unless possession of the firearm was itself an economic activity substantially affecting interstate commerce. Depenbrock claims that it is not enough to show that the firearm had been transported in interstate commerce. We are bound by the holding in United States v. Hanna, 55 F.3d 1456 (9th Cir. 1995), to the proposition that "[s]ection 992(g)'s requirement that the firearm have been, at some time, in interstate commerce is sufficient to establish its constitutionality under the Commerce Clause." Id. at 1462 n.2.

AFFIRMED.